ANDREW WADI
versus
LUCIA MNKANDLA
and
EMMANUEL NGWENA MUSARA
and
CITY OF KWEKWE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 20 FEBRUARY 2018 AND 1 MARCH 2018

Opposed Application

S Siziba with *A Sibanda* for the applicant
Ms P Dube for the respondent

MATHONSI J: The applicant is a former councilor of the Municipality of Kwekwe which is cited herein as the third respondent. He has brought this application against the current Chamber Secretary and Town Clerk who are the first and second respondents respectively and the municipality itself seeking an order compelling the respondents to facilitate the transfer of Stand No. 7311 Kwekwe Township of Lot 6 Sebakwe Block Kwekwe (the stand) from the third respondent to third parties to whom he sold the stand but has been unable to cede or transfer to the said third parties because the stand is registered in the name of the third respondent.

The application is premised on the fact that at a time when the applicant served as a councilor in the municipality in 2005 he had purchased the industrial stand at an extremely concessionary rate of 40% of its value in terms of a ministerial directive issued by the Minister of Local Government, Public Works and National Housing designed to benefit sitting councilors. More than a decade later the applicant decided to sell the undeveloped stand to four people, namely Miriam Moyo, Oppa Tititi, Mercy Tititi and Isaac Tititi Moyo for a purchase price of $75 000-00. His effort to pass transfer to those purchasers has hit a brick wall as the third respondent refused to authorize it forcing the applicant to file this application for a compelling order.

As the applicant's claim is based purely on a contract entered into between himself and the municipality, there was a serious misjoinder of the first and second respondents who are mere officials of the municipality. Ms *Dube* who appeared for the respondents was quick to raise a point *in limine* objecting to the joinder of the two officials who are not privy to the contract. Mr *Siziba* for the applicant initially tried to justify the inclusion of the first and second respondents in the suit by suggesting that although the two were acting in their official capacities, they had done so impartially and to the prejudice of the applicant. For that reason it was proper to cite them in their individual capacities. The fallacy of that argument became self-evident after Mr *Siziba* and I had exchanged a few war stories. In the end Mr *Siziba* conceded that the first and second respondents were wrongly cited. He however tried to dodge liability for the misadventure by submitting that the applicant should not be visited with the wasted costs. I found no merit in those submissions because clearly the first and second respondents were unnecessarily put out of pocket when they had no business being cited in this application at all. I therefore upheld the point *in limine* with costs, a decision which shall be reflected in the final order to be made.

In his founding affidavit the applicant stated that in pursuance of a ministerial directive I have mentioned, the municipality allocated to him stand 2826 Kwekwe Township of Lot 6 Sebakwe Block in Kwekwe which he was entitled to purchase at a concessionary rate of 40% of its value as directed by the Minister. As a result, an agreement of sale was signed between him and the municipality in respect of that stand on 24 May 2004. The Executive Mayor and the Town Clerk signed the agreement on behalf of the municipality. The size of that stand was given in the agreement as 8589 square metres and the purchase price was $247 850-00 Zimbabwe currency.

The applicant stated that he duly paid the full purchase price for the stand in question. Much later the municipality discovered that the stand it had sold to the applicant was not available as it had already been allocated to someone else. The municipality then decided to replace the stand the applicant had purchased with another one namely stand 7311 which forms the basis of this application. The second stand was however much bigger than the previous one measuring 1,0601 hectares in extent and worth $636060-00 at the prime price of $60-00 per square metre.

The task to communicate the swap was left to Edward Mapara, who then held the position of Chamber Secretary in the municipality. Writing on behalf of the Town Clerk to the applicant on 23 November 2005 Mapara stated:

> "RE: APPLICATION FOR INDUSTRIAL STAND 7311 KWEKWE TOWNSHIP OF LOT 6 OF SEBAKWE BLOCK KWEKWE
> Further to your application for an industrial stand, I am pleased to advise you that Council resolved to offer you stand 7311 Kwekwe Township of Lot 6 of Sebakwe Block measuring 1, 0601 hectares at $60/m². The total cost for the stand is $636 060,00. We note that you had already made payment with respect to stand 2826 and by a copy of this letter the City Treasurer is advised to transfer that payment to stand 7311.
>
> Yours faithfully
> E N MUSARA
> TOWNN CLERK."

It is remarkable that the letter in question does not say whether the sum of $636060-00 quoted there in is what the applicant was expected to pay given that the stand was being sold at 40% of its value in terms of a ministerial directive. It also does not say if the sum mentioned was the concessionary rate after factoring in the 60% rebate. Although it talks about the payment made by the applicant in respect of stand 2826 being transferred to cover the purchase price for stand 7311, the letter is silent as to what was to happen with the balance of the price, it being common cause that the applicant had only paid the sum of $247 850-00.

Edward Mapara who penned the letter novating the earlier sale agreement of May 2004 (I do not agree with the wild claims by the second respondent that it is him who penned it because the letter clearly bears Mapara's reference), has deposed to a supporting affidavit in which he states;

> "1. I am a legal practitioner of this Honourable Court and other courts in Zimbabwe. I am presently the Executive Secretary of the Law Society of Zimbabwe but prior to my present posting I was the Chamber Secretary at the third respondent, the City of Kwekwe.
> 2. I have read the affidavit of Andrew Wadi and confirm that the allocation of stand 7311 was a clean swap in lieu of stand 2826 QueQue Township.
> 3. I confirm that annexure A1 was written by me and constitutes an official communication and is binding on the third respondent.
> 4. We had inadvertently sold to him stand 2826 which had already been sold to someone else and stand 7311 was a replacement.
> 5. That would explain why I did not talk of an adjustment in Annexure A1.

6. I would also want to point out that stand 7311 was offered as a single stand and not a portion thereof."

Relying on Mapara's affidavit to explain the circumstances under which the sale agreement was novated, the applicant stated that he accepted the stand as a replacement and was not asked to pay any more money. Thereafter he enjoyed possession and access to the stand for more than 12 years until he decided to sell it to other people on 24 August 2017. When he did so he then approached the first respondent with a request to provide a letter to the Zimbabwe Revenue Authority confirming that he owned the stand in order that it could be ceded to the purchasers. It is only then that the first respondent contended that the applicant did not own the whole of the stand measuring 1, 0601 hectares but only 8589 square metres of it which is the size of the original stand he had purchased. The Chamber Secretary is said to have given the applicant two options in the circumstances: either he pays for the difference at the current United States dollars rate or he suffers the municipality to subdivide it and give him only 8589 square metres of it.

In the applicant's view the two options are both untenable because he purchased the whole of the stand and the money he had paid for an earlier stand was allowed to stand as the purchase price. Apart from that, if the third respondent wanted more money for the stand, which it did not say, it should have demanded it then and cannot do so more than 12 years later when such claim is prescribed. In any event, the stand was purchased at a concessionary rate of 40% of its true value which the third respondent is now ignoring demanding the full value.

The application is strongly opposed by the third respondent which generally accepts the facts set out by the applicant except that the applicant was not expected to pay extra money for the stand. The third respondent uses "simple arithmetic" to argue that the applicant was expected to make up for the deficit in the prices of the two stands after he had already paid for a smaller stand, in 2004 and in 2005 was allocated the bigger stand after the third respondent itself discovered its mistake of a double allocation.

In his opposing affidavit the second respondent acknowledges that by circular dated 6 August 2003 to him written by the Secretary for Local Government, the Minister approved the allocation of stands "of their choice, either low density residential, commercial or industrial at cost" to all sitting councilors. He confirmed that the stated cost was at the reduced rate of 40%

of the market value of the stand. He admitted that indeed after discovering the double allocation the third respondent allocated the applicant stand 7311 in terms of Mapara's letter. He went on to say that the import of that letter was that the applicant was required to pay for the extra area of land in the new stand. Unfortunately the letter does not say that. Musara stated that despite Mapara's letter there was need for the parties to enter into a fresh agreement for the second stand and, as there was no such new agreement, the applicant has no right to it until he complies with the third respondent's requirements which were communicated to him only recently, and then pay a further sum of $500-00 for the preparation of a new agreement involving stand 7311. It is not clear in terms of what law and, if it is by agreement, in terms of which agreement the third respondent is entitled to impose such conditions.

Be that as it may, Musara referred to an audit that was belatedly conducted by the third respondent following the applicant's approach in 2016 requesting to alienate the stand. The audit report compiled by M Mutema the third respondent's internal audit manager on 23 February 2016 is significant, not by resolving the conundrum created by the quoted price of $636 060-00 for the stand, because it does not resolve or even explain that figure, but by the telling findings which point an unwavering accusing finger at the third respondent itself. It states:

> "Mr Wadi bought stand 2836 (*sic*) in 2004 measuirng 8589 square meters. He paid for it in full i.e. ZW $247 850,00. However it so happened that the stand had already been sold to First Gass Private Limited. He was then reallocated stand 7311 Lot 6 of Sebakwe Block measuring 1, 0601 ha at a cost of $636060-00. A letter was generated to him on 23 November 2005 informing him of the movement to stand 7311. However the only noted (sic) that he had already paid for stand 2826 and therefore Treasury advised to transfer the amount to stand 7311. There was no emphasis on the need to pay for the difference in square metres since stand 7311 was much bigger. As a result Mr Wadi did not pay for the difference in size of the new stand."

Clearly therefore the applicant was not charged anything extra for the bigger stand and was not asked to pay anything over and above what he had already paid for the previous stand. Now we have Mapara, who dealt with the matter in 2005, saying that the transaction was a clean swap as the stand was "a replacement" of the one bought earlier and that for that reason he deliberately did not talk of an adjustment in prices. We also have the executive mayor at the time, Stanford Bonyongwe, who executed the sale agreement on behalf of the third respondent, coming in by supporting affidavit deposed to on 7 November 2017, to say that as executive

mayor he deliberately did not charge the applicant anything extra for the new stand because it is them who had inconvenienced the applicant by the double allocation. They had held his purchase price for over a year while it accumulated interest.

The third respondent however argues against the tide of evidence from those who dealt with the matter on its behalf at the time to insist that it is entitled to revise the price. It is an argument which cuts against the grain of even the Town Clerk's letter of 29 March 2016 to the applicant which reads in part;

> "RE: INDUSTRIAL STAND 7311 KWEKWE TOWNSHIP OF LOT 6 SEBAKWE BLOCK KWEKWE
> The above issue refers. It has come to our attention that your reallocation from stand 7311 Lot 6 Sebakwe did not take into account the difference in area of the two stands."

What comes out of that is simply that the third respondent allocated the applicant the stand. When it did so it did not charge any extra money in consideration of the differences in sizes. Now, more than 12 years after making a bad business decision, it would like to revisit the deal and not renegotiate but unilaterally impose a new agreement on the applicant. Is it entitled to do so? I do not think so.

While on the one had Musara tries to argue that the sale agreement between the parties involving stand 7311 "was invalid because the property still belongs to third respondent" on the other hand he seems to suggest that the third respondent is entitled to revise the price or subdivide the stand to give the applicant a smaller portion of it. Those two cannot go hand in hand. It is either an agreement was created by the parties binding on them between 2004 and 2005 or it was not. If it was not, then the matter ends there with its attendant issues of what then becomes of the purchase price paid by the applicant in 2004. If an agreement binding on the parties, no matter how bad it was to either of the parties, was created is it competent for one of the parties to unilaterally vary its terms, albeit several years later? If so in terms of what law or right? Those are the issues which this court has to resolve now.

That the applicant and the third respondent entered into a government-backed sale agreement in 2004 in terms of which the third respondent sold a stand to the applicant on certain terms and conditions is pretty obvious and cannot be contested by any party. The agreement in question did not come to fruition after the third respondent had already been paid the purchase

price, all because the third respondent itself fettered its ability to perform its part of the bargain when it allocated the same stand to a third party. It is not apparent from the papers when such allocation was made but what is apparent is that the third respondent was against the wall, having taken the purchase price, when it tried to right a wrong by availing another stand to the applicant in 2005.

I therefore have to consider the legal implications of Mapara's letter of 23 November 2005 which I have reproduced above. Ms *Dube* for the respondent submitted that the parties were never at *consensus ad idem* in respect of the sale of stand 7311 because the third respondent offered the stand at a purchase price of $636 060-00 which was never accepted by the applicant and as such a binding sale agreement did not come into being. Mr *Siziba* for the applicant took the view that the third respondent desires to have the court excuse it from its contractual obligations arising out of its replacement of a stand previously sold to the applicant and paid for.

I think the third respondent's biggest undoing is to look at Mapara's letter as initiating a new deal quite divorced from the previous one. It occurs to me that the letter in question was righting a wrong that had been created by the third respondent's own lack of diligence. It took the form of novation in contract law. According to the learned author R. H Christe, *Business Law in Zimbabwe,* 2nd edition, Juta & Company Ltd, 1998 at pp 107-109:

> "Novation means the replacing of an existing obligation by a new one, the existing obligation being thereby discharged. The incentive to novate in Roman Law, to replace a contract that was procedurally difficult to enforce by one that was easier to enforce, no longer exists, and the question nowadays is usually whether the new contract was truly intended to replace the old or whether it was intended merely to provide additional security, in which case the old contract remains enforceable. Because novation involves a waiver of existing rights it follows that it will not be presumed and, as held in *Ballenden* v *Salisbury City Council* 1949 SR 269 273, 1949 (1) SA 240 246, it must be strictly proved."

I have no doubt in my mind that novation has been established. The third respondent itself acknowledges that it offered the applicant a new stand which he accepted. It acknowledges, as I have shown above, that it did not demand and was not offered a top-up of the purchase price. In fact the third respondent did not even bother to compute what could have been extra money due for the bigger stand. The audit report acknowledges that an oversight occurred on its part to demand payment of the balance.

In my view such an oversight cannot work against the applicant and in favour of the third respondent. There is a celebrated principle of our law expressed in the maxim: *nemo ex suo delicto meliorem suam conditionem facere potest*, loosely translated to mean that noone can make his better by his own misdeed. That is exactly what the third respondent attempted to do when it discovered its own tardiness. It has sought to use its bargaining strength to craft a new contract. It cannot do that because a contract already exists between the parties entitling the applicant to stand 7311 on terms fixed in 2005. It fits perfectly in the words of GARWE JA in *Agribank* v *Machingaifa and Another* 2008 (1) ZLR 244 (S) at 253 C-D where the learned Appeal Judge, in a slightly different context, remarked:

> "Such an entitlement could not be changed, altered or amended at whim on the basis that the appellant was entitled to change its policies and procedures from time to time. A party to a contract cannot unilaterally alter the terms and conditions of the contract in these circumstances."

The doctrine of sanctity of contract is embedded in our legal science. It postulates that men (and of course women), of full legal capacity and competent understanding, are at liberty to contract with one another. When they have so contracted freely and voluntarily, their contracts are held sacred and must be enforced by courts of law who shall not lightly interfere with that freedom of contract. As a matter of public policy, courts of law not only do not interfere with the freedom of the parties to contract as they please as long as the contracts are lawful, they also do not make contracts for the parties. They only enforce and give effect to what the parties have agreed to. Those lofty ideals of our law were expressed with silky eloquence by PATEL JA, writing for the Supreme Court, in *Magodora & Others* v *Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403 C-D. He said:

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells* v *South African Alumenite Company* 1927 AD 69 at 73; Christe *The Law of Contract in South Africa* 3ed at pp 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union and Another* 1997 (3) SA 851 (W) at 864 E-H."

What is clear is that the third respondent made a bad bargain when it gave the applicant, without asking for more money, a stand which was much bigger than the one it was replacing. Whether that was by design as alleged by Mapara and Bonyongwe or it was a mistake as stated in the audit and by Musara, is immaterial for purposes of this court. It gave rise to a binding contract which is sacrosanct and is enforceable by this court with all its consequences, good or bad. I conclude therefore that the third respondent sold the stand to the applicant. He is entitled to sell it to whomsoever he chooses, who should be entitled to receive transfer.

I do not regard it as an earth-shattering issue that clause 12 of the initial agreement for stand 2826 precluded the applicant from ceding or assigning his rights in the stand without prior written consent of the third respondent. I say so because of two reasons. Firstly the third respondent's contestation is premised on there being no contract at all and that issue is raised as foot note. More importantly, the third respondent concedes in paragraph 3.5 of its opposing affidavit that:

> "In 2016, applicant approached 3rd respondent to enquire whether he could dispose of the stand."

The third respondent's consent was therefore elicited but was unreasonably and indeed unlawfully withheld when the third respondent saw an opportunity to make undeserved money out of the issue. It can therefore not benefit from its greed.

In the result, it is ordered that:

1. The third respondent is directed to sign all documents necessary to cede, assign or transfer all rights, title and interest in stand 7311 Kwekwe Township of Lot 6 Sebakwe Block situate in the District of QueQue measuring 1, 0601 ha to the applicant or any other person or persons of the applicant's choosing within five (5) days of the date of this order.

2. The third respondent is directed to issue any documents to the Zimbabwe Revenue Authority as are necessary to facilitate cession or transfer of the said stand to the applicant or other nominees of his choosing.

3. The applicant shall bear the first and second respondents' wasted costs.

4. The third respondent shall bear the applicant's costs of suit.

Messrs Mhaka Attorneys, applicant's legal practitioners
Mutatu and Partners C/o Dube-Tachiona & Tsvangirai, respondents' legal practitioners